United States Court of Appeals

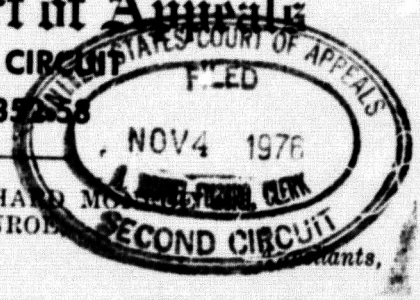
for the Second Circuit

BRIEF FOR APPELLEE

76-7352-53

To be argued by
JAMES A. WADE

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-7352-53



NADINE MONROE, FLOYD RICHARD MONROE and LISA ALLEN MONROE,

Appellants,

—v.—

L. PATRICK GRAY, HENRY HARRIS, WILLIAM MINER, EDWARD McKAY, FRANK E. DULLY, HAROLD J. EISENBERG, ALBERT S. BILL, PHILIP R. DUNN, LOUIS C. WOOL, ANDREW BRAND, FRANCIS LONDREGAN, GEORGE GILMAN, IGOR SIKORSKY, JR., SUISMAN, SHAPIRO, WOOL & BRENNAN, THOMAS E. TROLAND, ANGELO SANTANIELLO, FLOYD MONROE, JR., and MARTIN GOTTESDIENER,

Appellees,

—*and*—

HARRY CONGDON, LOIS CONGDON, JANET CONGDON and LOIS CONGDON CHURCHILL, KEVIN LEBOVITZ, KEVIN LEBOVITZ, JR., and ROXANNE LEBOVITZ,

Appellants,

—v.—

L. PATRICK GRAY, III, LOUIS C. WOOL, LOUIS C. MARUZO, ROY L. SMITH, MELVIN SCOTT, JOHN COLLERAN, JOHN ELLSWORTH, EDWARD LAVALLEE, HENRY HARRIS, WILLIAM MINER, EDWARD McKAY, SUISMAN, SHAPIRO, WOOL & BRENNAN, ABRAHAM BORDON, FRANK NASTI, JR., STELLA PETRIE, WILLIAM BEEBE, JOHN MAZER, JOSEPH FIRGELEWSKI and ROBERT T. MAXWELL,

Appellees.

BRIEF OF APPELLEES
L. Patrick Gray, Louis C. Wool, Andrew Brand and Suisman, Shapiro, Wool & Brennan

JAMES A. WADE, ESQUIRE
Robinson, Robinson & Cole
799 Main Street
Hartford, Connecticut 06103
Attorney for Appellees
Gray, Wool, Brand and
Suisman, Shapiro, Wool & Brennan

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Statement of the Case

This action was commenced in District Court, Docket No. H-76-91, by the Appellant, Nadine Monroe, individually and in her capacity as mother, next friend and natural guardian of her children, Fred Richard Monroe and Lisa Allen Monroe against, among others, these Appellees, L. Patrick Gray, Louis C. Wool, Andrew Brand and their law partnership, Suisman, Shapiro, Wool & Brennan, claiming that they had conspired with the Plaintiff's

former husband, other named attorneys who had previously represented the Appellant and two Connecticut judges to deprive the Plaintiffs' of their civil rights during a divorce action in the State of Connecticut to which the Appellant was a party. The Complaint also purports to claim violations by these Appellees, and others, of the antitrust laws of the United States albeit without a specification of the alleged violations.

These Appellees filed a Motion to Dismiss the Appellants' Complaint on the ground that it failed to allege a cause of action upon which relief could be granted in violation of Rule 12(b) of the Federal Rules of Civil Procedure and because the Court lacked subject matter jurisdiction under 28 U.S.C. § 1343 or under the antitrust laws of the United States. The other Appellees joined in this Motion to Dismiss.

The Appellants moved for permission to amend the Complaint by adding additional plaintiffs. This motion was denied on the ground that the proposed additional plaintiffs had no interest in the specific claims alleged by the Plaintiff. A second motion to amend the complaint was filed, adding as a new defendant, the Hartford County Bar Grievance Committee, and restating the claims. This motion to amend was allowed by the Court. These Appellees filed a Motion to Dismiss the amended complaint for the same reasons enunciated in their original motion.

The Appellants, Harry Congdon, et al, in Docket No. H-76-239, commenced a companion action which alleged substantially the same claims against the Defendant L. Patrick Gray and made various claims against the other attorneys named in the original *Monroe* case. On June 25, 1976, the Court granted the Motion to Dismiss of each of the Defendants in both Docket Nos. H-76-91 and H-76-239 dismissing the actions in each. On June 30, 1976, judgment entered in favor of all Defendants dismissing the Complaints.

The Complaint—Appellant Monroe, *et al*, District Court Docket No. H-76-91

The Complaint of the Appellants Monroe purports to allege a violation of the rights, privileges and immunities guaranteed them by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution in violation of 18 U.S.C. §§ 241 and 242 and 42 U.S.C. §§ 1983 and 1985. It also purports to allege violations of 15 U.S.C. §§ 1, 3, 13, 15 and 25, the antitrust laws of the United States, although no particular violations are set forth. Under the alleged civil rights violations, Appellants enumerate so-called "overt acts" on Pages 3 through 10 of the Complaint. An examination of these "overt acts" insofar as they relate to the Appellees Wool and Brand indicate that all of the allegations against these Appellees arise out of their activities as attorneys while representing Mrs. Monroe's former husband, the Defendant Floyd Monroe. These allegations all focus on the negotiations and ultimate disposition of the divorce between the Monroes. Interwoven through these allegations are claims directed toward the Defendant L. Patrick Gray, which purport to arise out of his duties and activities while he was the acting Director of the Federal Bureau of Investigation. These allegations in no way relate to the main thrust of the Complaint, have no interrelationship with the same and appear to have no purpose other than to bring a newsworthy party into the litigation. The motion to dismiss on behalf of Appellees Wool, Brand and Gray and their law firm asserted that insofar as these Appellees are concerned, the Plaintiff was not entitled to maintain an action in the United States District Court under 42 U.S.C. §§ 1983 and 1985 because these Appellees were not "public officials" within the meaning of the statute, there was no "state action" alleged to support a civil rights claim and there was no allegation of a conspiracy with public officials within the reach of the

statute. Additionally, it was claimed that the Complaint simply fails to make any allegations against any of the Defendants which are proscribed by the antitrust laws of the United States.

The Complaint—Appellant Congdon, *et al*, District Court Docket No. H-76-239

The Complaint filed on behalf of the Appellants Congdon et al tracks almost identically with that filed by the Appellants Monroe. Once again, the allegations relate to a private divorce action interspersed with claims against Appellee L. Patrick Gray relating to his duties as acting Director of the FBI. In addition, allegations are directed against the Appellee Wool by Appellant Lebovitz that relate to Wool's representation of Lebovitz in a domestic dispute. The District Court viewed the allegations of this Complaint as alleging the same type of claim as set forth in the *Monroe* Complaint. In its ruling on the motion to dismiss filed in the *Monroe* action, the Court made the same applicable to the *Congdon* Complaint as well since basically the same legal points were contained therein.

Issues

1. Did the District Court err in dismissing the Complaints against these Appellees on the ground that they failed to allege a cause of action upon which relief could be granted under the civil rights laws of the United States?

2. Did the District Court err in dismissing the Complaints against these Appellees on the ground that they failed to allege a cause of action upon which relief could be granted under the antitrust laws of the United States?

ARGUMENT

I

The District Court was correct in holding that the complaints failed to allege a cause of action under the Civil Rights Act.

42 U.S.C. § 1983 imposes liability upon

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, . . .

In order to sustain a claim under this section of the law, a plaintiff must allege and prove that he has suffered the deprivation of federally protected rights, privileges or immunities as a result of actions allegedly taken by a named defendant. A threshold question is whether or not a complaint sets forth sufficient allegations to constitute "state action". *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739, 741 (2d Cir. 1974). It has been recognized that the Fourteenth Amendment to the United States Constitution applies only to actions of the "states" and not to those actions which are "private". The "under color of state law" provision in § 1983 is equivalent to the state action requirement of the Fourteenth Amendment. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152, n.7 (1970); *United States* v. *Price*, 383 U.S. 787, 794-95 (1966).

Purely private conduct by private individuals cannot give rise to a cause of action under the civil rights act.

Timson v. *Weiner*, 395 F. Supp. 1344 (S.D. Ohio E.D. 1975). In order to bring a private person under the purview of § 1983, the plaintiff must allege active cooperation by the state in the private party's conduct in order for "state action" to be present. *Hohensee* v. *Dailey*, 383 F. Supp. 6, 9 (M.D. Pa. 1974). However, the mere use of a state's judicial process is not a sufficient allegation of active cooperation by the state with a private party to establish a civil rights action. Thus, for example, in *Hohensee* v. *Dailey*, *supra*, wherein a landlord brought an eviction action against a tenant, the Court said:

> Reading Plaintiff's complaint as liberally as possible the Plaintiff does not allege that the State of Pennsylvania was in any way involved in the supposed deprivation of his Constitutional rights by the Defendants. At most, Hohensee may be interpreted as claiming that the Defendants have utilized the State law to his detriment. The mere fact that an individual utilizes state process against another does not make the actor's conduct cognizable as state action.

Reading the allegations in both Complaints most liberally, the allegations against the Defendants Wool and Brand and their law firm are that they engaged in the representation of a client in connection with divorce proceedings. While Mrs. Monroe may be unhappy with such representation, the Complaints do not rise to the dignity of a civil rights claim against these Appellees. Similarly, dissatisfaction with the result obtained by the Appellants in the *Congdon* suit does not support a civil rights claim against their lawyers. Moreover, the Appellants allege that these Appellees and Mrs. Monroe's attorneys conspired with one another to proceed to judgment in her divorce action before the Honorable Thomas Troland, a referee for the State of Connecticut sitting as the Superior Court for New London County. Every act performed by a

judge in his judicial capacity is immune from damage suits by litigants. A litigant's remedy is by appeal. *Dear* v. *Rathje*, 391 F. Supp. 1, 5 (N.D. Ill. E.D. 1975). Judicial immunity is a valid defense under 42 U.S.C. § 1983. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Lombardi* v. *Bockholdt*, Civil No. H-75-221 (D. Conn. 11/17/75), *aff'd mem.* (2d Cir. April 21, 1976).

As a logical corollary to the immunity of state judges from civil rights actions, private parties cannot be held liable under § 1983 for conspiring with a state judge who is himself immune from suit under that section. *Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975). In *Meyer* v. *Lavelle*, 389 F. Supp. 972, 976 (E.D. Pa. 1975), the plaintiff brought an action against a state judge, Wisconsin Surety Company and Wisconsin's counsel claiming that they had violated his civil rights in obtaining a judgment against him in a state court. The United States District Court for the Eastern District of Pennsylvania granted a motion to dismiss against the state court judge on the ground of judicial immunity. It then dismissed the claim against the private parties as well, saying:

> A private person cannot be held liable under Title 42, U.S.C. § 1983 unless his wrongful action was done under color of state law or state authority. Further, a private person alleged to have conspired with a state judge and prosecuting attorney who are entitled to immunity cannot be held liable, since he is not conspiring with persons acting under color of law 'against whom [plaintiff] could state a valid claim' under 42 U.S.C. § 1983.

It was under this rationale that the District Court held that an allegation of a conspiracy with Referee Troland, who was himself immune from suit, could not supply the "necessary nexus to official activities". Memorandum of Decision, Page 3.

Similarly, the claim of a civil rights conspiracy by these Appellees with the Appellants' own attorneys is without merit. The mere fact that attorneys in Connecticut are also Commissioners of the Superior Court does not convert all of their activities into state action for purposes of a lawsuit brought under § 1983. *Fine* v. *City of New York*, 529 F.2d 70, 74 (2d Cir. 1975); *Steward* v. *Meeker*, 459 F.2d 669 (3d Cir. 1972). In *Kovacs* v. *Goodman*, 383 F. Supp. 507, 509 (E.D. Pa. 1974), the Court granted a motion to dismiss a civil rights action against defendants who were all private attorneys saying:

> It is settled that 'lawyers who participate in a trial of private state court litigation are not state functionaries acting under color of state law,' *Skolnick* v. *Martin*, 317 F.2d 855, 857 (C.A. 7, 1963); that 'in private litigation the state merely furnishes the forum and has no interest one way or another in the outcome', *Bottone* v. *Lindsley*, 170 F.2d 705, 706 (C.A. 10, 1948); and that although a private attorney is an 'officer of the court', he is not an official of any state, *Steward* v. *Meeker*, 459 F.2d 669 (C.A. 3, 1972).

Several Courts of Appeal have ruled that private attorneys handling litigation are not acting under color of state law for purposes of civil rights claims. *Steward* v. *Meeker*, *supra*; *Hill* v. *McClellan*, 490 F.2d 859 (5th Cir. 1974); *Cooper* v. *Wilson*, 309 F.2d 153 (6th Cir. 1962); *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969); *Haldane* v. *Chagnon*, 345 F.2d 601 (9th Cir. 1965). *See also Hamilton* v. *Jamison*, 355 F. Supp. 290 (E.D. Pa. 1973); *Peake* v. *County of Philadelphia, Pennsylvania*, 280 F. Supp. 853 (E.D. Pa. 1968).

All of the allegations involving the Appellees Wool and Brand and their law firm involve their dealings as attorneys. As such, they are inadequate to sustain a cause of action under § 1983. The allegations involving the Appellee Gray are simply interspersed with the alle-

gations relating to the divorce proceedings with no apparent connection. It appears that these allegations add nothing to the substance of the Complaints and are included simply for the purpose of engendering newspaper comment. Therefore, it is apparent that no cause of action has been alleged which entitled the Appellants to relief under § 1983.

Insofar as a cause of action under 42 U.S.C. § 1985 is concerned, the Complaints are devoid of any factual allegation which bring this statute into play. Section 1985 deals with conspiracies to prohibit officers of the United States from performing their duties. There are no allegations in the Complaints against any of these Appellees or for that matter any of the other defendants which raise a claim of a § 1985 violation.

Accordingly, it is respectfully submitted that the District Court was correct in dismissing the Complaints insofar as they purported to allege a civil rights claim against these Appellees.

II

The District Court was correct in dismissing the alleged antitrust conspiracy.

The Complaints rather vaguely alleged violations of the antitrust laws of the United States by claiming that the Defendants conspired to "knowingly and willingly restrain the practice of law in interstate trade, to deny the plaintiffs and the general public the benefits of constitutional and legal protections and set minimum and enforced illegal minimum fee schedules". This lengthy, conclusory allegation did not set forth the essential factual elements of an antitrust claims. Indeed it is assumed that the thrust of this portion of the Complaint was really aimed at the two grievance committees who were named

as defendants. Nowhere do the Complaints allege that the Defendants Gray, Wool, Brand or their law firm engaged in any actions which were violative of the antitrust laws. Therefore, it is respectfully submitted that the District Court was correct in holding that even in the case of a pro se litigant there must be a sufficient factual allegation in order to sustain a claim of an antitrust violation.

CONCLUSION

The judgment of the District Court dismissing the Complaints in both the *Monroe* and *Congdon* actions should be affirmed.

APPELLEES, L. Patrick Gray, Louis C. Wool, Andrew Brand and Suisman, Shapiro, Wool & Brennan

By: JAMES A. WADE
Robinson, Robinson & Cole
799 Main Street
Hartford, Connecticut 06103
Their Attorney

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-7352-53

NADINE MONORE, et al

Appellants

v.

L. Patrick Gray, et al

Appellees

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 4th day of November, 1976, deponent served the within Brief for Appellees L.Patrick Gray, Wool, Brand upon SEE ATTACHED LIST

Attorney(s) for the see list in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 4th day of November 1976

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977

Nadine Monroe
16 Morgan Street
New London, Connecticut 06320

Harry Congdon, Lois Congdon, Janet Congdon
Beaverbrook Road
Lyme, Connecticut

Lois Congdon Churchill
22 Lebanon Avenue
Colchester, Connecticut

Kevin Lebovitz, Kevin Lebovitz, Jr., and Roxanne Lebovitz
46 Morgan Street
Pawcatuck, Connecticut

Halloran, Sage, Phelon & Hagarty
25 Lewis Street
Hartford, Connecticut 06103
Attorneys for Gray, Wool, Brand and Suisman, Shapiro Wool & Brennan

Carl R. Ajello, Esquire, Attorney General; Barney Lapp, Esquire, Assistant Attorney General and Daniel R. Schaefer, Esquire, Assistant Attorney General,
20 Trinity Street
Hartford, Connecticut 06103
Attorneys for Thomas E. Troland, Angelo Santaniello, Henry Harris, William Miner, Edward McKay, Frank E. Dully, Harold J. Eisenberg, Albert S. Bill, Philip R. Dunn

Albert J. Callahan, Esquire
60 Washington Street
Hartford, Connecticut 06103
Attorney for Igor I. Sikorsky, Jr.

Joseph E. Moukawsker, Esquire
309 State Street
New London, Connecticut 06320
Attorney for Floyd Monroe, Jr.

Conway, Londregan, Leuba & McNamara
4 Whale Oil Row
New London, Connecticut 06320
Attorneys for Francis T. Londregan

Gillooly & McGrail
265 Church Street
New Haven, Connecticut
Attorneys for George Gilman

Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut
Attorneys for John Ellsworth

Wiggin & Dana
P. O. Box 1832
New Haven, Connecticut 06508
Attorneys for Martin Gottesdiener